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Francis J. Earley (FE-7520)
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY and POPEO, P.C.
666 Third Avenue
New York, New York 10017
(212) 935-3000

ATTORNEYS FOR AUSTRALIAN GOLD, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
S & L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

v.

05 CV 1217 (JS)(ML)

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff.
----- X

AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

v.

LARRY SAGARIN AND JOHN DOES,
1-10,

Third Party Defendants,
----- X

**AUSTRALIAN GOLD'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO COMPEL**

Australian Gold, Inc. ("Australian Gold"), by counsel and pursuant to F.R.C.P. 26, 37,
and 45, seeks an order compelling non-parties **REDACTED** to produce documents
responsive to the subpoena served by Australian Gold on October 7, 2005, for which they have

failed and refused to respond. Australian Gold also seeks its attorney fees and expenses pursuant to F.R.C.P. 37 for having to file this motion.

Factual Background Relevant To The Motion

A. The Parties and the Issues

Australian Gold is the manufacturer and exclusive distributor of Australian Gold®, Caribbean Gold® and Swedish Beauty® tanning lotions and other tanning related products ("Products"). Australian Gold's Products are considered premium tanning lotions in the indoor tanning industry and are sold to the majority of the over 25,000 tanning salons throughout the United States.

Australian Gold distributes the Products through independent distributors for resale to tanning salons and hair care salons that offer on-premises tanning and instruction on the use of the Products. Sales to beauty supply stores, flea markets, internet sellers and other similar outlets are strictly prohibited. Distributors are prohibited from selling the Products to anyone outside of the distribution channel, including to those persons or entities that sell the Products on the internet.

S & L Vitamins filed this lawsuit against Australian Gold seeking declaratory judgment that its purchase and sale of the Products did not violate federal trademark law or interfere with Australian Gold's distributorship agreements with its authorized distributors. S&L Vitamins did not disclose its sources for obtaining the Products in its complaint, and refused to voluntarily do so in communications between counsel for the parties.

Based upon the volume of business that S&L Vitamins does, Australian Gold believes that S&L Vitamins' suppliers are one or more authorized distributors, and that S&L Vitamins is using false pretenses or a straw man to purchase the Products. Thus, Australian Gold filed

counterclaims against S&L Vitamins and claims against Larry Sagarin, its principal, alleging violations of federal trademark and copyright law, interference with contract, and other state law claims.

B. S&L Vitamins was ordered to disclose its suppliers.

On July 25, 2005, the Court conducted a status conference. Australian Gold raised the issue that S&L Vitamins sought court approval of its activities yet it had refused to disclose the names of its suppliers. The Court stated that absent “revealing the source” S&L Vitamins’ declaratory judgment claims failed because its case was not ripe, and that the identity of the suppliers would still be discoverable in Australian Gold’s counterclaims. (Transcript of July 25, 2005 Hearing, at pp. 28-29, for which copies of the relevant pages are attached hereto as *Exhibit A*). The Court ruled that counsel for Australian Gold was entitled to know if he has “a rogue retailer who he can cut off” and ordered S&L Vitamins to disclose its suppliers pursuant to the terms of a protective order, which has since been entered by the Court.

On August 23, 2005, S&L Vitamins, through its counsel, disclosed the names and addresses of four alleged suppliers. These “suppliers” are four retail establishments in the New York area. A true and correct copy of the letter making this disclosure is attached hereto as

Exhibit B.

REDACTED

was one of the suppliers identified.

The principal at was identified as

C. Subpoena to

On October 7, 2005, Australian Gold served subpoenas on all four suppliers, including . Service of process was effected by hand delivery on all four suppliers. A true and correct copy of the subpoena served on and the affidavit for the return of service is attached to the accompanying Declaration of Scott Matthews (“Matthews Decl.”) as *Exhibit 1*.

The subpoena requested the following documents:

1. Any and all documents related to any communications between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.
2. Any and all copies of any contracts or agreements between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin which have been executed or were in effect from January 1, 2002 through the present.
3. Any and all documents that reflect all sales made by you to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present for any Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions.
4. Any and all purchase orders received by you from S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin for the purchase of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions.
5. Any and all invoices related to your sale of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.
6. Any and all e-mails between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.
7. Any and all documents related to any ownership interests, management or control of your business by S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin.
8. Any and all documents which identify any distributor or supplier from whom you have ordered or purchased, or attempted to order or purchase, any Australian Gold, Swedish Beauty and/or Caribbean Gold Products from January 1, 2002 through the present, including any and all purchase orders, invoices, contracts, or agreements.

REDACTED

response was due on or before October 21, 2005, but they failed to respond. Matthews Dec. at ¶ 5.

D. Attempts to Obtain a Response from [REDACTED] and [REDACTED]

In an effort to avoid motion practice before the Court, Australian Gold has attempted to resolve this issue through means other than filing a motion to compel. On or about October 28, 2005, Australian Gold's Indianapolis counsel Scott D. Matthews, who was admitted *pro hac vice* in this lawsuit, placed a telephone call to [REDACTED] at the telephone number provided by S&L Vitamins and left a voicemail message requesting [REDACTED] to contact him. Matthew Dec. at ¶ 6. [REDACTED] did not return that telephone call. *Id.*

REDACTED

On October 28, 2005, Australian Gold, by its counsel, sent a letter to [REDACTED] and [REDACTED] demanding that they contact Mr. Matthews, by 5:00 p.m. on October 31, 2005. Matthews Dec. at ¶ 7. A true and correct copy of that letter is attached to the Matthews Declaration as *Exhibit 2*. Once again, [REDACTED] failed to respond. At the time of filing this Motion, [REDACTED] had not responded to the subpoena or contacted any of Australian Gold's attorneys. *Id.*

ARGUMENT

A. [REDACTED] Failed to Respond to the Subpoena Duces Tecum and Therefore Should be Held in Contempt and Compelled to Respond

[REDACTED] should be compelled to respond to the subpoena and produce all documents relevant to the requests made therein. Australian Gold properly served the subpoena on [REDACTED] on October 11, 2005. Further, [REDACTED] is within the jurisdiction of this court as [REDACTED] New York is located within the Eastern District of New York. *See* Subpoena and Affidavit Return of Service (Ex 1 to Matthews Decl.). [REDACTED] had not timely objected to the subpoena or offered any excuse as to why they have failed to respond.

Federal Rule of Civil Procedure 45(d) sets forth a non-party's obligation to respond to a subpoena. It provides:

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

F.R.C.P. 45(d).

has an affirmative obligation to respond to the subpoena under oath. *See e.g. Securities Investor Protection Corp. v. Executive Securities Corp.*, 433 F.Supp. 470, 474 (S.D. NY. 1977). They must state “under penalty of perjury, either that [they] do[] not have possession of the subpoenaed records and [are] not the custodian[s] of such records or that [they have] another valid excuse for failing to produce them.” *Securities Investor Protection*, 433 F.Supp. at 474.

Rule 45(e) provides that “[f]ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.” F.R.C.P. 45(e). The failure to account *in any way* for the non-production of the book is prima facie evidence of contempt of the subpoenas duces tecum. *Id.*

In this case, has completely ignored the subpoena and counsel’s attempts to secure compliance with the subpoena. Based upon the information provided by S&L Vitamins, Australian Gold has a reasonable belief that possesses information relevant to this lawsuit. It properly invoked its right to subpoena records to verify if in fact is a supplier of S&L Vitamins. This court should hold in contempt of court and compel them to respond to the subpoena.

REDACTED

B. Australian Gold Should be Awarded its Attorney Fees and Costs Associated with this Motion.

Australian Gold requests that the Court award it its reasonable attorney fees and costs associated with filing this Motion. refusal to respond to the subpoena forced Australian Gold to file this Motion, despite Australian Gold making a good faith effort to obtain compliance without seeking Court intervention.

Under Federal Rule of Civil Procedure 37, sanctions, including attorney fees, are appropriate. Rule 37 provides that if a motion is granted or if the discovery is provided after the motion was filed mandate the award of fees. It provides, in relevant part:

the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

F.R.C.P. 37(a)(4)(emphasis added).

Australian Gold requests that the Court award it reasonable attorney fees and costs. Australian Gold further requests that the Court order it to submit to the Court the fees and expenses it has incurred, and allow the opportunity to respond.

REDACTED

REDACTED

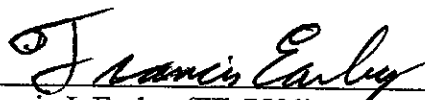
CONCLUSION

For all of the foregoing reasons, Australian Gold requests that the Court issue an order compelling . . . to produce documents responsive to the subpoena served on October 7, 2005, and award Australian Gold its attorney fees and costs associated with this Motion.

Dated: New York, New York
November 2, 2005

Respectfully submitted,

MINTZ LEVIN COHEN FERRIS GLOVSKY
AND POPEO, P.C.



Francis J. Earley (FE-7520)
MINTZ LEVIN COHEN FERRIS GLOVSKY
AND POPEO, P.C.
The Chrysler Center
666 Third Avenue
New York, New York 10017
(212) 935-3000
(212) 983-3115 (Fax)

Michael A. Wukmer, Esq.
Scott D. Matthews, Esq.
ICE MILLER
One American Square, Box 82001
Indianapolis, IN 46282-0200
(317) 236-2179 Phone
(317) 529-5418 Fax

Attorneys for Australian Gold, Inc.

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S&L Vitamins, Inc.,

Plaintiff,

V.

Australian Gold, Inc.,

Defendant.

Docket #CV-05-1217 (JS)

United States Courthouse
Central Islip, New York
July 25, 2005

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE MICHAEL L. ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For The Plaintiff:

David Stein, Esq.
Coleman Law Firm, PC
1350 Broadway-Ste. 1212
New York, NY 10018

Ronald Coleman, Esq.
Coleman Law Firm, PC
1350 Broadway-Ste. 1212
New York, NY 10018

For The Defendant:

Francis J. Earley, Esq.
Mintz Levin Cohn Ferris
Glovsky & Popeo, PC
666 Third Ave.
New York, NY 10017

Scott Matthews, Esq.
Ice Miller
One American Square
Indianapolis, IN 46282

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1 Audio Operator:

2 Transcribing Firm:

Writer's Cramp, Inc.
6 Norton Rd.
Monmouth Jct., NJ 08852
732-329-0191

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5 Proceedings recorded by electronic sound recording, transcript
6 produced by transcription service.
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1 THE CLERK: Calling Civil 2005-1217, S&L Vitamins,
2 Incorporated v. Australian Gold, Incorporated. Please state
3 your appearance.

4 MR. STEIN: Judge, good morning, David Stein, S-T-E-
5 I-N, here on behalf of the Plaintiffs.

6 MR. EARLEY: Francis Earley from Mintz Levin for the
7 Defendant, Australian Gold, Inc.

8 MR. MATTHEWS: Scott Matthews with Indianapolis law
9 firm of Ice Miller for Australian Gold.

10 THE COURT: Indianapolis, eh?

11 MR. MATTHEWS: Yes, sir, Judge.

12 THE COURT: My goodness.

13 MR. MATTHEWS: I've been getting grief --

14 THE COURT: You traveled all this way? You must be
15 taking vitamins.

16 (Laughter)

17 MR. MATTHEWS: That's right.

18 MR. EARLEY: He's tan, too, Judge, it's obvious he's
19 got some lotion in there, too.

20 THE COURT: The only question is, which set? And
21 whose vitamins?

22 (Laughter)

23 MR. MATTHEWS: I can assure you --

24 THE COURT: Or the other question is, whose label?

25 MR. MATTHEWS: There you go.

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1 THE COURT: Please be seated. Oh -- we have a
2 counterclaim, too, in this -- my goodness. All right. Tell me
3 about the Plaintiff's case first. Since you started this, you
4 get to go first.

5 MR. STEIN: Judge, we only started it because they
6 made us do it.

7 (Laughter)

8 MR. STEIN: Judge, we basically had to file this
9 Declaratory Judgment Action because we had received letters --

10 THE COURT: Well, what do you want the Court to
11 declare? Tell me about it.

12 MR. STEIN: That we have not done anything wrong,
13 Judge.

14 THE COURT: Who can ever say that?

15 MR. STEIN: Judge?

16 THE COURT: Who can ever say that?

17 MR. STEIN: Just in a nutshell, Judge, our client,
18 S&L Vitamins --

19 THE COURT: Not enough vitamin capsules, eh? You're
20 insisting on a nutshell and not a vitamin capsule?

21 MR. STEIN: Whatever dispenser you'd like to put it
22 in, Judge, we'll be happy to provide.

23 THE COURT: Okay.

24 MR. STEIN: Judge, he sells items over the internet
25 and they happen to be items called Australian Gold and their

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1 products. And --

2 THE COURT: What is an Australian Gold?

3 MR. STEIN: That they have suntan products, Judge.

4 THE COURT: Is that what the (indiscern.) on
5 Australian Gold is? Okay. Well, as you can tell, do I look
6 like I'm suntanned?

7 MR. MATTHEWS: You have a nice glow.

8 THE COURT: Oh, okay.

9 MR. STEIN: In any event, Judge, he's not changing
10 any labels. He's calling it what it is --

11 THE COURT: So what is he calling it?

12 MR. STEIN: He's calling it whatever the Australian
13 Gold -- he's selling -- for all intents --

14 THE COURT: Well --

15 MR. STEIN: -- and purposes, Judge, he's selling
16 Pepsi Cola --

17 THE COURT: Well, where's he getting it from?

18 MR. STEIN: He's getting --

19 THE COURT: That may be what the problem is.

20 MR. STEIN: Judge, he gets it from retailers -- not
21 from distributors.

22 THE COURT: So he buys it retail?

23 MR. STEIN: Yes, Judge.

24 THE COURT: And then he sells on the internet?

25 MR. STEIN: Yes.

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1 THE COURT: Is there an expiration date on this
2 stuff?

3 MR. STEIN: Not sure, Judge.

4 MR. MATTHEWS: The -- I'm not sure if it's actually
5 on the bottle, the product does go stale if it sits on the
6 shelf too long.

7 THE COURT: Well, don't you think you would have an
8 expiration date? I mean, even Budweiser beer puts a date on
9 their beer, right?

10 MR. MATTHEWS: Right. I'm not sure if we're as
11 sophisticated as Budweiser, but the product does go stale if
12 it's old. And it --

13 THE COURT: You mean it doesn't tan or it tans
14 unevenly when it's old?

15 MR. MATTHEWS: It'll -- some of the product, for
16 example, the consistency will go and it just doesn't perform
17 the same way -- some of the products have things to make your
18 skin tingle or you're bronze and it may not --

19 THE COURT: Tingle?

20 MR. MATTHEWS: Tingle. That's actually going to be
21 an interesting issue in this case, but --

22 THE COURT: Is it supposed to tingle or not tingle?

23 MR. MATTHEWS: It is supposed to tingle.

24 THE COURT: It's supposed to tingle. So the tingle
25 goes out of it if it's too old, eh?

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1 MR. MATTHEWS: Well, I'm not -- I'm just saying,
2 some of those ingredients may not -- may lose their force, in
3 effect, if they sit on the shelf. I'm not a tanning lotion
4 expert. But I do know they have a shelf life.

5 THE COURT: Anyway, you're selling their stuff on
6 the internet?

7 MR. STEIN: No, Judge, they're calling it their
8 stuff.

9 THE COURT: Okay, so --

10 MR. STEIN: They're not calling it S&L, and they
11 sent a cease and desist letter --

12 THE COURT: You call it Australian Gold, or whatever
13 their product is named?

14 MR. STEIN: Yes, sir. There's no allegation, I
15 don't believe, that we're mislabeling it or calling it
16 something other than what it is. He's not saying it says Mel
17 Tanning Lotions, he's calling Pepsi Pepsi, Judge. And in any
18 event, in January of 2004, they sent a cease and desist letter
19 to our client. We in turn responded with an offer to please
20 supply us with your various bona fides, whatever they may be,
21 as to what you think our client is doing, how he might be
22 violating various contracts that they have with their
23 distributors. My understanding, Judge, is that the following
24 is some exchange in correspondence we did not hear back from
25 them until February of this year, in which case there was a

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1 renewed threat and that's --

2 THE COURT: Well, how did you send your letter?
3 Pony Express?

4 MR. STEIN: Judge, sent it -- through the good old
5 United States Mail, fax, and who knows else, Judge. I think
6 there's an allegation that they did not receive it. But in any
7 event, Judge, so in February of 2005 there was a renewal on
8 their part to force the issue, and that's why we decided to
9 jump in with a Declaratory Judgment, Judge. And we will --
10 what we would be seeking from this Court ultimately is a
11 judgment that we've not done anything wrong and that they're
12 just trying to control their distribution channels, and in
13 essence they're doing it unfairly. Trying to squeeze S&L
14 Vitamins --

15 THE COURT: Okay. Now, you're not reopening the
16 bottles, anything like that?

17 MR. STEIN: No, Judge.

18 THE COURT: Okay. Is this a liquid?

19 MR. MATTHEWS: Yes.

20 THE COURT: Okay, now let me hear from -- get the
21 Defendant's side. Which one of you is going to talk about
22 this?

23 MR. MATTHEWS: I will, Your Honor, thank you.

24 THE COURT: Okay.

25 MR. MATTHEWS: This case is unique because a lot of

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1 people will think that tanning lotions are something you can
2 buy at any drugstore, smear it on your body, and you'll get the
3 intended effect.

4 THE COURT: I thought you only bought it at Saks
5 Fifth Avenue --

6 MR. MATTHEWS: Well, you might be able to --

7 THE COURT: Nordstrom, I mean, you know.

8 MR. MATTHEWS: That's more expensive for my blood,
9 but the indoor tanning industry has really evolved and grown
10 into a very big business --

11 THE COURT: Yes, all of a sudden, this stuff now
12 works better than it's ever worked, right?

13 MR. MATTHEWS: It works very well and it --

14 THE COURT: And before you used to come in and you
15 looked like you turned into a pumpkin.

16 MR. MATTHEWS: You were orange and blotchy at times.
17 And part of that is because there's better equipment and my
18 client --

19 THE COURT: Were you rated by Consumer Reports?
20 Were you one of the ones that were rated by Consumer Reports
21 recently?

22 MR. MATTHEWS: I'm not aware of that report.

23 THE COURT: I thought Consumer Reports did one on
24 suntan lotion or something like that.

25 MR. MATTHEWS: I don't know. Australian Gold is one

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1 of the brand names -- that is the name of the parent company --
2 Swedish Beauty and Caribbean Golds are their other brands --

3 THE COURT: What are they, the United Nations of
4 suntan lotions? Swedish, Australia -- I mean, you know --

5 MR. MATTHEWS: All located in the heart roads of
6 America -- crossroads of America in Indianapolis. And this
7 company was started 20 years ago by a husband and wife and
8 they've grown into a leader of tanning lotion manufacturing and
9 distribution throughout the world. And Australian Gold is the
10 leading brand in the country. But these products are
11 distributed to professional tanning salons for use only --

12 THE COURT: Oh, well, you see, that's part of the
13 problem. You're not supposed to go professional tanning salons
14 anymore. That's dangerous for your health. Don't you read the
15 newspapers on the East Coast here?

16 MR. MATTHEWS: That's not an issue that we're gonna
17 address today, at least. From my perspective --

18 THE COURT: What's your SPF on this stuff?

19 MR. MATTHEWS: The indoor tanning session is usually
20 --

21 THE COURT: You don't do an SP on the indoor stuff?

22 MR. MATTHEWS: There is no SPF on the --

23 THE COURT: There's no (indiscern.) --

24 MR. MATTHEWS: No, because you --

25 THE COURT: So you wouldn't wear this on the beach?

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1 It wouldn't -- doesn't supplant Coppertone or Banana Boat, eh?

2 MR. MATTHEWS: It doesn't. If you wore it outside
3 you'd have no SPF protection and you would burn.

4 THE COURT: And you don't in the suntanning -- under
5 those suntan lamps?

6 MR. MATTHEWS: Right. And the suntan lamps control
7 the amount of exposure you get, so these products are designed
8 for indoor use. As I was mentioning earlier, we have very
9 different products. Some products are designed to give you a
10 bronze look instead of the pumpkin look you referred to
11 earlier. Other ones, for example, the tingle product, contains
12 skin irritants and it turns the skin red and that increases
13 blood flow. It allows the tanning process to speed up and give
14 you a better tan.

15 THE COURT: That brings the blood to the surface?

16 MR. MATTHEWS: Well --

17 THE COURT: Not that it increases blood flow, it
18 brings the blood to the surface.

19 MR. MATTHEWS: You're correct. And that increases
20 the tanning experience. Someone who is fair skinned and uses a
21 tingle product will have a very adverse reaction. Someone with
22 blond hair or red hair could not use that product.

23 THE COURT: So, you don't use it.

24 MR. MATTHEWS: I don't use it. And I've put it on
25 my arm, and my arms turned red. They have different tingle

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1 strengths. One of the things Australian Gold is adamant about
2 is --

3 THE COURT: But then you can tell everybody you went
4 out fishing in Indianapolis.

5 MR. MATTHEWS: It looks like you have hives, more
6 than --

7 THE COURT: Okay.

8 MR. MATTHEWS: -- sunburn.

9 THE COURT: So, it's an allergic reaction, really?

10 MR. MATTHEWS: It really is, because it irritates
11 the skin. And for example, I went to a trade show to learn
12 more about this industry, and my wife, I gave her a sample
13 packet. She put tingle on her face and she called me one day
14 crying from work saying, "This product's hurting me." And, so
15 Australian Gold has to be very careful how they use these
16 products with tanning beds and FDA medical advice, and so the
17 idea is that these products are for the indoor market, used in
18 professional salons --

19 THE COURT: They can only be used in an indoor
20 facility? Or --

21 MR. MATTHEWS: It --

22 THE COURT: -- these indoor -- well, then why are
23 the indoor facilities selling it to the people?

24 MR. MATTHEWS: I'm sorry?

25 THE COURT: People who come -- are they selling it

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1 to their clients who come in for a tan and they can take it
2 home with them?

3 MR. MATTHEWS: And they can take it home.

4 THE COURT: And but so it doesn't have to be used in
5 -- at the salon?

6 MR. MATTHEWS: Doesn't have to be used at the salon,
7 but it -- but the client who purchases it should understand
8 that this tanning lotion may or may not work with your skin
9 type. This tanning lotion would be better for you. So they're
10 instructed properly. And that is one of the key issues in this
11 case because --

12 THE COURT: You mean you don't have enough
13 instructions on the bottle?

14 MR. MATTHEWS: Because everybody's skin -- you
15 cannot just give a chart and say that Mr. Earley here is
16 suitable for this product or not that -- you need -- because
17 everybody's skin is different you need the face to face
18 consultation. The internet, which is what S&L Vitamins is
19 doing --

20 THE COURT: Well, we sell Viagra over the internet,
21 don't we? Don't you need a face-to-face consultation for that
22 too, at times?

23 MR. MATTHEWS: Well, perhaps, but in this case it's
24 important, so, that we have the face to face consultation. In
25 any event, that's a little bit about this country -- or

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1 company. And after this lawsuit was filed, we have filed a
2 lawsuit for some of their activities and one of the main
3 problems that we have -- Australian Gold has a distribution
4 network that is a closed distribution system. All distributors
5 are under contract with Australian Gold. The contract
6 prohibits the sale to anyone that's not a tanning salon. You
7 cannot sell to the Wal-Mart, you cannot sell to grocery stores
8 or other chains. You can't sell into retail outlets. They
9 have to be sold to professional salons who offer instruction in
10 use on the product. That is in our contract.

11 THE COURT: Well, obviously you got a couple of bad
12 middle people there.

13 MR. MATTHEWS: We do. And one of the issues here in
14 this case is, we believe that S&L Vitamins and Mr. Sagerin have
15 found a hole in our distribution network.

16 THE COURT: Well, let me ask you a question. Your
17 contracts, are they requirement contracts?

18 MR. MATTHEWS: No, they are not.

19 THE COURT: That somebody's got to buy a particular
20 amount?

21 MR. MATTHEWS: No, they are not.

22 THE COURT: In order to keep receiving Australian
23 Gold?

24 MR. MATTHEWS: No, they are not. They are not.
25 They can buy as little as one bottle, although that probably

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1 wouldn't make much business sense for us to have a relationship
2 with that, but there are no requirement contracts.

3 In any event, Mr. Sagerin and S&L Vitamins have purchased
4 these products from a source. They say it's a retail source.
5 They've asked this Court to declare that their activities --
6 that they've done nothing wrong and they reiterated that
7 request here today, yet they will not tell us their source.
8 They will not make that known to us. And therefore we believe
9 that they are interfering with our contracts based upon the
10 manner in which it's sold on the internet and the volume they
11 were having to do -- they just simply couldn't obtain these
12 products from other sources.

13 Perhaps these issues could be narrowed if we had a
14 disclosure from S&L Vitamins that, this is our source and we
15 had an opportunity to do some due diligence and verify that
16 that was the source. We might be able to streamline this case,
17 at least with respect to those claims. But at this point I
18 don't think the other side's willing to do that. They wanna
19 protect their source, at least at this point. The other issue
20 -- and these are allegations that we --

21 THE COURT: Well, Judy Miller went to jail for that,
22 didn't she? Huh?

23 MR. MATTHEWS: For now. So, and that's one issue we
24 may have in this case --

25 THE COURT: Others may follow, but she's certainly

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1 the leader, isn't she?

2 MR. MATTHEWS: She sure is. So, the other issue
3 with respect to the activities. S&L Vitamins operates an
4 internet website. Our contracts with our distributors are for
5 United States products for sale in the United States. These
6 distributors can only sell in the United States. European
7 countries have different labeling requirements that must be
8 followed. And we have information that we've just discovered
9 that will -- we will be -- it's our intention I believe to
10 amend our counterclaims because we understand that S&L Vitamins
11 is now selling into Europe, selling the U.S. products. And
12 those products are not genuine products in the European market.
13 They're not authorized to be sold in Europe.

14 THE COURT: So, what's the European Union doing
15 about this? Don't they have their own trade laws now?

16 MR. MATTHEWS: Well, and I don't know the answer to
17 that --

18 THE COURT: You know, the ones that France and the
19 Netherlands, and Belgium turned down? You remember them,
20 right?

21 MR. MATTHEWS: Yeah, I don't know what's happening.
22 We just discovered this information recently. So, that's
23 another allegation and a fact where the products are being
24 distributed in a manner that was not intended, and certainly
25 products that should not be leaving the United States. The

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1 other allegations that our client has are the way in which the
2 products are advertised. On the website, there is a photograph
3 of the Australian Gold product. Over that photograph --

4 THE COURT: Can I ask you a question? What's so
5 different about your product versus some of the other over-the-
6 counter products that are sold out there? Is there a
7 difference?

8 MR. MATTHEWS: From what --

9 THE COURT: Tanning -- bottle of the stuff -- they
10 can buy in CVS or Eckerd or --

11 MR. MATTHEWS: You know --

12 THE COURT: Difference between your -- Australian
13 Gold and these other products which promise you a wonderful
14 tan.

15 MR. MATTHEWS: Well, I think the things that you see
16 in CVS and Eckerd are the outdoor market products. The indoor
17 products --

18 THE COURT: No, I'm not talking about outdoor. I'm
19 talking about indoor. I believe indoor --

20 MR. MATTHEWS: Okay. I don't know the answer --

21 THE COURT: There's a whole series of this stuff out
22 now for women -- particularly the women, because the men
23 generally don't get involved in it. There are men who do, but
24 generally it's the women who buy this stuff.

25 MR. MATTHEWS: Well, I know that -- like I said, for

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1 example, the bronzer and the tingle products are things that I
2 don't think you see outside of tanning salons, and I don't
3 believe all the other manufacturers, if any, have the tingle.
4 I think some do but that is a different type of product, so
5 there's --

6 THE COURT: You can't buy this stuff at Macy's at
7 the makeup counter, eh?

8 MR. MATTHEWS: I don't think -- well, I --

9 THE COURT: Or Bloomie's at the -- Bloomingdales, I
10 mean --

11 MR. MATTHEWS: Right.

12 THE COURT: -- I forgot you're -- I don't know if
13 there's a Bloomingdales in Indianapolis yet.

14 MR. MATTHEWS: No there's --

15 THE COURT: Are they yet?

16 MR. MATTHEWS: We have a Macy's.

17 THE COURT: Okay, well, it's the same ownership, so
18 --

19 MR. MATTHEWS: Yeah.

20 THE COURT: Federated Department Stores, so --

21 MR. MATTHEWS: I don't -- honestly, I haven't
22 visited the makeup counter in a while, so I don't know the
23 answer to whether or not you can buy it at Macy's.

24 THE COURT: You're just going to have to go along
25 with your wife.

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1 MR. MATTHEWS: I know better. If I bought it, she
2 wouldn't wear it. So, I don't know the answer to that.

3 THE COURT: Okay.

4 MR. MATTHEWS: But anyway those are allegations.
5 The manner in which they're advertising the products. They're
6 putting their name over our photographic images, suggesting
7 that there's a sponsorship and affiliation between S&L Vitamins
8 and our products that is not there. And in fact that causes us
9 harm in the --

10 THE COURT: Didn't I just see a case from the 2nd
11 Circuit come down, Star Distributors against somebody? Not on
12 suntan, but in a trade dress -- trademark-type thing?

13 MR. MATTHEWS: I'm not familiar with that one.
14 There is a --

15 THE COURT: Last month, in June 2005?

16 MR. MATTHEWS: There are some cases -- the thing
17 that these folks are doing, they're paying to use Australian
18 Gold's trademark with Yahoo. And they've also put it in the
19 metatags, which is the source code. And there's --

20 THE COURT: Oh, so we got -- yes, there's a case in
21 the 2nd Circuit dealing with these popup ads.

22 MR. MATTHEWS: There was a recent case on the popup
23 ads, I'm not sure that's directly on point.

24 THE COURT: Not directly, but now that you're
25 talking about internet and you're saying that they're putting

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1 their stuff on top of your stuff and --

2 MR. MATTHEWS: Right, and I think -- so that issue
3 is gonna be --

4 THE COURT: You read that case yet?

5 MR. STEIN: I believe I did, Judge. Was it
6 involving When You --

7 THE COURT: Yes, When You Come and 1-800 -- right --

8 MR. STEIN: I did read it and I don't remember
9 specifically, nor do I --

10 THE COURT: And there was another trade case with
11 Star -- involving Star something or other. I think it was --
12 was it Giorgio?

13 MR. MATTHEWS: Not the --

14 THE COURT: Might have been the Giorgio case?

15 MR. STEIN: I don't recall the --

16 THE COURT: Giorgio Vodka vs. something or other Rum
17 --

18 MR. STEIN: All I know --

19 THE COURT: And Bacardi Rum.

20 MR. MATTHEWS: Yeah, I've read the --

21 THE COURT: Star Distributors -- I think it's the
22 Bacardi vs. the Giorgio folks.

23 MR. MATTHEWS: Well, I've read the When You case and
24 actually, we're waiting on a decision on the 10th Circuit on
25 the initial interest confusion on the use of the trademarks in

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1 the metatags for the same client that was litigated in Oklahoma
2 two years ago. And it's been briefed in the 10th Circuit.

3 THE COURT: Now, they had affirmed Judge Bayer on
4 the case, didn't they, in the 1-800 case? Or When You Come,
5 right?

6 MR. STEIN: I believe so, Judge.

7 THE COURT: Yes, that was an affirmance of Judge
8 Bayer who did do some injunctive work there, right?

9 MR. STEIN: Again, I don't remember specifically --

10 THE COURT: Do you remember when you read it?

11 MR. STEIN: I remember when I read it --

12 THE COURT: You'll remember it when you read it.
13 Going to have an effect on you.

14 MR. STEIN: I don't --

15 THE COURT: Or your popups.

16 MR. STEIN: There's no allegation of popups here
17 either, Judge.

18 THE COURT: No. Well --

19 MR. STEIN: But --

20 THE COURT: It's not a question of popup, it's a
21 question of the source.

22 MR. MATTHEWS: Right.

23 THE COURT: The identification with them as a
24 source.

25 MR. MATTHEWS: Right.

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1 MR. STEIN: Judge, I --

2 THE COURT: And that's not a good thing. I'll tell
3 you that right now.

4 MR. STEIN: As a general proposition, though, I do
5 believe that the 2nd Circuit is very much supportive of what's
6 happening in this case, Judge.

7 THE COURT: Well, I don't know about internet. When
8 you look at the 1-800 case and the case that we're just now
9 talking about. I do agree with you that with regard to some of
10 the cases which involved Quality King --

11 MR. STEIN: Then there was the John Paul Mitchell --
12 it's cited in --

13 THE COURT: Now the John Paul Mitchell I understand
14 and I believe that the Quality King cases when we're talking
15 about -- but that's a different type of thing.

16 MR. STEIN: Judge, the -- as to the matter --

17 THE COURT: One -- in one of those cases, they were
18 selling expired products. Another one was cleared issue as to
19 whether or not the shampoo was counterfeit. Okay?

20 MR. STEIN: Again, Judge, these are nonissues here.

21 THE COURT: Oh --

22 MR. MATTHEWS: Well, to the extent that we have
23 counterfeit product in Europe or nongenuine products --

24 THE COURT: All right, now, are your contracts of
25 sale -- are they exclusive or not?

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1 MR. MATTHEWS: They are not exclusive with -- the
2 contracts at issue are distributorship agreements for the
3 United States. These distributors can sell other
4 manufacturers' products --

5 THE COURT: Okay.

6 MR. MATTHEWS: And there are no exclusive
7 territories --

8 THE COURT: Now, the reason why I make a comment
9 about Quality King is because at one time Quality King did get
10 its stock from other distributors that were being sold by --
11 either whether it was John Paul Mitchell or whether it was
12 being some of the other outfits --

13 MR. MATTHEWS: Right, and in Quality King I think it
14 was --

15 THE COURT: Or Nexxus, which is also supposed to
16 have been only sold in salons, if you recall. Nexxus'
17 contracts I believe also were very similar to yours.

18 MR. MATTHEWS: And I think the Quality King case was
19 where he was getting it from a middle man in China so there was
20 an intervening party --

21 THE COURT: Yes, but what were those products doing
22 in China?

23 MR. MATTHEWS: I don't know.

24 THE COURT: Oh, okay.

25 MR. MATTHEWS: And I may have the cases confused --

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1 THE COURT: He was getting them from -- actually,
2 was getting them from Europe. And what was happening in the
3 Quality King cases is that the people were buying the stuff
4 because -- that's why I asked you whether there were
5 requirement contracts. And the only way they can meet their
6 requirements was to dump them off and keep -- in order to keep
7 the relationship going. That's why that's going to be part of
8 the discovery as to whether or not any of your retailers that
9 you're selling to -- these salons -- think that they have to
10 buy a certain amount to continue receiving product.

11 MR. MATTHEWS: And they do not.

12 THE COURT: I do not know. Well, you say that, I
13 don't know about what -- your retailer, you know -- I'm not in
14 the mind of your tanning salons. In any event I think you do
15 have to -- you know, you do have a problem if what he's saying
16 is true with regard to how you're putting your label on or how
17 you're labeling your stuff on the net. In your catalog. If
18 there is a --

19 MR. STEIN: With the metatags --

20 THE COURT: -- false -- if there is a confusion as
21 to false origin, then I think you have a problem.

22 MR. STEIN: Judge, with respect to the metatags, #1,
23 I don't know for -- I'm not here to tell the Court that he even
24 has metatags, but #2, even if he has the metatags that say
25 Australian Gold, Judge, there's absolutely nothing wrong with

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1 doing that according to Terry Wells case in 9th Circuit which
2 is the standard. He calls it Australian Gold, and if he says
3 that in the metatags there's absolutely nothing wrong with
4 doing that.

5 THE COURT: Well, however, if he's putting it under
6 the name of S&L Vitamins somewhere -- but let's not talk about
7 Europe at the moment. I mean, because I suspect that Europe is
8 going to have its own little thing here. You know, from the
9 standpoint of the amendment, I'm not going to get involved in
10 it at the moment. But from the standpoint of linking S&L with
11 Australian Gold, in -- on your site, forgetting whether you can
12 sell or not sell their product. Forgetting that issue --
13 whether or not you -- with your linkage of S&L with it, may be
14 a problem -- under the Lanham Act.

15 MR. STEIN: If he's doing such a thing, Judge, and I
16 don't believe that he is --

17 THE COURT: Well, the web -- the site shows what
18 he's doing and what he's not doing. Whether they have copies
19 of the site, I don't know. It's a site that's out there for
20 everybody, right? I don't know what they're doing.

21 MR. STEIN: Judge, if he's (indiscern.) --

22 THE COURT: All I can tell you is if you're putting
23 S&L as the -- as a link to Australian Gold then you may or may
24 not have a problem there.

25 MR. STEIN: He's -- Judge, if he's Playmate of the

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1 Year he can say he's Playmate of the Year. So, he's saying --
2 I sell Australian Gold. He's selling Australian Gold. It's
3 not that he's saying I sell Australian Gold and I don't --

4 THE COURT: I understand. Now, suppose you put on
5 your bottle, "To be sold only in salons" --

6 MR. MATTHEWS: We do not.

7 THE COURT: What do you think would happen?

8 MR. MATTHEWS: I don't think it matters under the
9 case law this Circuit at least what I've read. And we don't
10 put that on our bottle.

11 THE COURT: Why not?

12 MR. MATTHEWS: I don't know the answer to that,
13 Judge.

14 THE COURT: Oh. You really want the help of this
15 Circuit, don't you think that would be a good idea?

16 MR. MATTHEWS: I think we --

17 THE COURT: Don't you think that would be a good
18 idea, that the labeling show that?

19 MR. MATTHEWS: I think that's a good idea to put
20 that.

21 THE COURT: Otherwise, how are you going to limit
22 the sales?

23 MR. MATTHEWS: Well, we do it by contract and
24 enforcing the contract.

25 THE COURT: That may be, but anybody can get a hold

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1 of this stuff. Suppose I'm Mrs. Smith and I go down to the
2 Sunny Salon, and I buy myself a bottle of Australian Gold, and
3 then I go out and sell it --

4 MR. MATTHEWS: Well, I can't --

5 THE COURT: What's the difference?

6 MR. MATTHEWS: I can't control what Mrs. Smith does
7 because that's beyond the First Sale Doctrine.

8 THE COURT: Well, Mrs. Smith puts it out on eBay.

9 MR. MATTHEWS: That's right, I can't control Mrs.
10 Smith --

11 THE COURT: You can't control eBay either, right?

12 MR. MATTHEWS: Cannot control eBay.

13 THE COURT: So, it can go on eBay, a bottle of your
14 Australian Gold. It still suffers the same detriments that S&L
15 suffers from, right?

16 MR. MATTHEWS: It -- my client tells us that every
17 day and don't -- and it's hard to understand because eBay
18 causes the same harm. The difference here is the manner in
19 which we believe it's being acquired. And that's gonna be a
20 big discovery issue in this case because in the initial
21 disclosure --

22 THE COURT: Well, I agree, and I assume that the two
23 sides --

24 MR. MATTHEWS: They sent no documents and they
25 didn't disclose the source. And if they're gonna seek

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1 Declaratory Judgment, I mean, I think that's the thing that has
2 to be done.

3 THE COURT: Well, I don't think they're going to get
4 a Declaratory Judgment without doing that, Counsel.

5 MR. STEIN: Judge --

6 THE COURT: On a highly confidential basis, only
7 Counsel --

8 MR. STEIN: Absolutely, Judge.

9 THE COURT: Well, I'm waiting for someone to say the
10 magic words.

11 MR. STEIN: Judge, we --

12 MR. MATTHEWS: We would --

13 MR. STEIN: I am not in a position to speak at this
14 time for what my client would agree to, but I do know that when
15 we get the letter -- when he gets the letter from Ice Miller
16 saying I'm going to sue you unless you tell me your sources,
17 you can bet that you have a guy that's not going to go public,
18 and he didn't. And they got a fight on their hands because of
19 that.

20 THE COURT: Well, I'm --

21 MR. STEIN: But if --

22 THE COURT: What I'm going to say to you is simple.
23 Absence revealing the source -- first of all, your case falls
24 apart because you don't have a case ripe for controversy.
25 Second of all, it's discoverable on the counterclaim. Which

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1 then takes over the main case since your case would be
2 dismissed, since you don't have a case of controversy. That's
3 right. Otherwise, you can't be selling this stuff and
4 therefore you have nothing to seek a Declaratory Judgment about
5 according to your case. On the other hand, that doesn't
6 dismiss the counterclaim and it is a discoverable item. So
7 what I am merely suggesting is that the two sides enter into a
8 highly confidential -- a Confidentiality Order, a Protective
9 Order which is a highly confidential -- which is only open to
10 Counsel and retained expert. Only retained -- no in-house
11 expert, no in-house Counsel --

12 MR. STEIN: Judge, I'm going to -- I'm gonna need to
13 know that -- about the relationship between Ice Miller and
14 Australian Gold, because as far as I'm concerned, if Scott
15 Matthews is the voice of CEO Australian Gold that's very
16 dangerous. Frank Earley might be differently situated, but
17 likewise --

18 THE COURT: I indicated that if he's in-house
19 Counsel, he is not retained Counsel outside Counsel, then it's
20 -- the information is not going in that direction. That's what
21 the purpose of highly confidential is. To distinguish it from
22 confidential which does go to Counsel -- all Counsel and to all
23 the officers. This does not go to officers or in-house
24 Counsel. Not interested in interfering with your relationship
25 with your retailers -- at the same time, Counsel is entitled to

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1 know whether he's got a rogue retailer who he can cut off. And
2 therefore that cuts off your supply line, but that's not a --
3 that's not your -- that's not my problem. They're entitled to
4 do that, if they've got somebody violating their contract.

5 MR. STEIN: Well --

6 THE COURT: They can cut it off.

7 MR. STEIN: Then I -- if -- then I'm missing the
8 confidentiality part of it, Judge. If they wanna know whether
9 it's a retailer or not and we can disclose it to the Court and
10 the Court would tell whether it is a retailer or not, that's
11 one thing, but if it goes to them and they go ahead and take
12 action, then my guy's out of business and they got just what
13 they wanted.

14 THE COURT: But the point is they don't have your
15 action against you, they have it against their own contract
16 vendor -- vendee. Which they're entitled to under their
17 agreement.

18 MR. MATTHEWS: And Your Honor, if it's a legitimate
19 retailer, as Counsel suggests, we can't take action --

20 THE COURT: Well, you're the one who's shown up with
21 the product and they want to know how you show up with their
22 product. All you can do is prevent possibly a lawsuit against
23 yourself. On the other hand, a lawsuit remains and since you
24 are selling it as to whether or not you are identifying them as
25 your source in your ads or in your net, you have a problem.

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1 Because if there's a problem with the labeling, for example, in
2 Europe, or if there is not the so-called one on one, or
3 consultation and you -- and a fair-skinned person uses the
4 wrong product, you have a liability, together with them. And
5 they're entitled to know who is selling it without giving that
6 consultation. And you're dealing with a public safety issue.

7 MR. STEIN: Judge, Selsun Blue tingles and I don't
8 believe that they --

9 THE COURT: I don't know if it does or it doesn't,
10 but the fact of the matter --

11 MR. STEIN: They're not tanning products.

12 THE COURT: But Counsel, you have to understand, the
13 name -- if you, you know, you -- whether you drop your lawsuit
14 or not for declaratory judgment or not, you're going to be
15 giving up the source.

16 MR. STEIN: Judge, again, I think that we could --
17 we would give up the source --

18 THE COURT: Otherwise there's going to be an
19 injunction against you and you're going to take it off the net.
20 And the people who operate the net are going to be told not to
21 accept S&L. And there will go your net presence. You got it?
22 That will be part of the injunction in the case. Well -- I
23 think you got to talk to your client as to what he or she wants
24 to do. I would suggest he open a salon.

25 (Pause in proceedings)

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1 THE COURT: Was the mandatory disclosure done?

2 MR. MATTHEWS: Well, we don't think it was complete,
3 but it was done.

4 (Pause in proceedings)

5 THE COURT: When are you going to have a complaint
6 by -- or the answer by?

7 MR. MATTHEWS: Thursday is our deadline to respond
8 to the Motion to Dismiss so we anticipated doing that on
9 Thursday. And then I think under Eastern District case law,
10 that would moot our need to respond to the Motion to Dismiss as
11 it would moot it. But we just want to confirm that with the
12 Court.

13 THE COURT: Well, you've already served an answer,
14 have you not? With the counterclaim, have you not?

15 MR. MATTHEWS: We answered on the counterclaim but
16 they have not filed a responsive pleading with respect to the
17 counterclaim.

18 (Pause in proceedings)

19 THE COURT: Well, it's time for discovery.

20 MR. MATTHEWS: I think we're gonna have some
21 discovery issues because of the reluctance to give up source,
22 but even if we didn't, because we're located in Indianapolis,
23 our officers are located in Indianapolis and S&L Vitamins is
24 here in New York -- and because I believe we will retain an
25 expert on our case, we would suggest nine to 12 months to

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1 complete discovery.

2 MR. STEIN: Judge, I think we have no problems with
3 that.

4 (Pause in proceedings)

5 THE COURT: Okay, I will see you in October.

6 (Court adjourned)

7

8 CERTIFICATION

9 I certify that the foregoing is a correct transcript from the
10 electronic sound recording of the proceedings in the above-
entitled matter.

10

11

Signature of Transcriber

Date

12

13

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EXHIBIT B

THE DIAMOND BUILDING
881 ALLWOOD ROAD
CLIFTON, NEW JERSEY 07012
973.471.4010
FAX 973.471.4646

1350 BROADWAY - SUITE 1212
NEW YORK, NEW YORK 10018
212.752.9500
FAX 212.752-9506

REPLY TO: Clifton

WWW.COLEMAN-FIRM.COM

COLEMAN LAW FIRM
A PROFESSIONAL CORPORATION

Fax

To: Frank Earley, Esq.

From: David M. Nieporent

Fax: 212-983-3115

Pages: 3, including cover sheet

Phone: 212-692-6230

Date: August 23, 2005

Re: S&L vs. Australian Gold

CC:

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• **Comments:**

Rule 26.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE UNITED STATES POSTAL SERVICE. THANK YOU.

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RONALD D. COLEMAN

JANE COLEMAN (ADMITTED IN NY ONLY)

NANCY EXLINE

DAVID STEIN (ALSO ADMITTED IN PA, IL AND DC)

PETER S. FRIEDMAN

DAVID MARC NIEPONENT (ADMITTED IN NJ ONLY)

DAVID WEINSTEIN - OF COUNSEL

LAWRENCE HERSH - OF COUNSEL

(ALSO ADMITTED IN CA, IL AND
REGISTERED TO PRACTICE BEFORE THE U.S.
PATENT AND TRADEMARK OFFICE)

1350 BROADWAY
SUITE 1212
NEW YORK, NY 10018
212-752-9500
FAX 212-752-9506

THE DIAMOND BUILDING
881 ALLWOOD ROAD
CLIFTON, NJ 07012
973-471-4010
FAX 973-471-4646

WWW.COLEMAN-FIRM.COM

August 23, 2005

VIA FACSIMILE

Francis J. Earley, Esq.
Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.
Chrysler Center
666 Third Avenue
New York, NY 10017

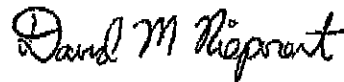
Re: S&L Vitamins v. Australian Gold
05-CV-1217 (JS) (MLO)

Dear Frank:

As per your conversation with my colleague David Stein earlier today, enclosed please find our supplemental Rule 26 disclosures, constituting the identity of the retailers who are our clients' suppliers of Australian Gold products. Please note that, as per the protective order entered by Magistrate Judge Orenstein on August 11, this information is CONFIDENTIAL-ATTORNEY'S EYES ONLY.

Please contact us if you have any questions about the above.

Very truly yours,



David M. Nieporent

Enc.

CONFIDENTIAL-ATTORNEYS EYES ONLY
SEALED BY COURT ORDER, S&L VITAMINS v. AUSTRALIAN GOLD, INC.

RULE 26 DISCLOSURES
ADDITIONAL WITNESSES

Retail establishments where Australian Gold products are purchased.

REDACTED

CONFIDENTIAL-ATTORNEYS EYES ONLY
SEALED BY COURT ORDER, S&L VITAMINS v. AUSTRALIAN GOLD, INC.